



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 62**

**[EPA-R02-OAR-2015-0755; FRL-9945-71-Region 2]**

**Approval and Promulgation of State Plans for Designated Facilities; Commonwealth of Puerto Rico; Control of Emissions from Existing Sewage Sludge Incineration Units**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving the State plan submitted by the Commonwealth of Puerto Rico to implement and enforce the Emission Guidelines (EG) for existing sewage sludge incineration (SSI) units. Puerto Rico's plan is consistent with the EG promulgated by the EPA on March 21, 2011. Puerto Rico's plan establishes emission limits and other requirements for the purpose of reducing toxic air emissions and other air pollutants from existing SSI units throughout the Commonwealth. At the request of Puerto Rico, the EPA is not taking action on a provision of its SSI plan allowing for affirmative defenses of Clean Air Act violations in the case of malfunctions. Puerto Rico submitted its plan to fulfill the requirements of sections 111(d) and 129 of the Clean Air Act.

**DATES:** This rule is effective on [insert date 30 days after date of publication in the Federal Register].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R02-OAR-2015-0755), to <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system).

For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Anthony (Ted) Gardella, Air Programs Branch, Environmental Protection Agency (EPA), Region 2, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-3892, or by email at [gardella.anthony@epa.gov](mailto:gardella.anthony@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. What action is the EPA taking today?**

The EPA is approving Puerto Rico's State plan submitted to the EPA on July 30, 2014, for the control of air emissions from existing sewage sludge incineration (SSI) units throughout the Commonwealth. When the EPA developed the New Source Performance Standards (NSPS) (subpart LLLL) for SSI units on March 21, 2011, it concurrently promulgated Emission Guidelines (EG) (subpart MMMM) to control air emissions from existing SSI units. The Puerto Rico State SSI plan adopts and implements the EG applicable to existing SSI units, and establishes other requirements for SSI units constructed on or before October 14, 2010.

The Puerto Rico Environmental Quality Board (PREQB) developed a plan, as required by sections 111(d) and 129 of the Clean Air Act (CAA), to adopt the EG into its body of

regulations, and EPA is acting today to approve Puerto Rico's plan.

As explained below, Puerto Rico requested in its July 30, 2014 submittal, that the EPA not take any action on a provision of the Puerto Rico State SSI plan allowing for affirmative defenses of CAA violations in the case of malfunctions.

Therefore, the EPA is not taking action on the affirmative defense provision portion of Puerto Rico's State SSI plan.

**II. What is the background for Puerto Rico's request that EPA not take action on the affirmative defense provision?**

In an April 18, 2014 opinion, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) vacated an affirmative defense in one of the EPA's Section 112 regulations. Natural Resources Defense Council v. Environmental Protection Agency, 749 F.3d 1055 (D.C. Cir., 2014) (vacating affirmative defense provisions in the Section 112 rule establishing emission standards for Portland cement kilns). The court found that the EPA lacked authority to establish an affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not the EPA. The Office of General

Counsel determined that EPA policy should reflect the court's decision. The vacated affirmative defense provision in the EPA's Portland cement MACT rule is identical to the affirmative defense provision in the EPA's SSI EG, promulgated on March 21, 2011, under sections 111(d) and 129 of the CAA, at §60.5181 ("How do I establish an affirmative defense for exceedance of an emission limit or standard during a malfunction?"). Puerto Rico's State SSI plan adopted all the applicable requirements of the EPA's SSI EG, including the affirmative defense provisions at §60.5181, into its State plan at Rule 405(d) of the Regulation for the Control of Atmospheric Pollution (RCAP). Specifically, Puerto Rico requested that the EPA not include the following affirmative defense provisions in Puerto Rico's Rule 405(d): (d) (2) (E), (d) (2) (E) (i) and (d) (2) (E) (ii) in Puerto Rico's State plan.

Because of the April 2014 D.C. Court vacatur referred to above, Puerto Rico, in its July 30, 2014 submittal letter to the EPA, requested that the EPA not take action on the affirmative defense provision included in Puerto Rico's State SSI plan submitted to the EPA for approval on July 30, 2014.<sup>1</sup>

---

<sup>1</sup> On April 13, 2016, the EPA Administrator signed the final rule for the Federal SSI plan which would apply to SSI units that are not covered by an approved and effective state plan. The Federal plan does not include an affirmative defense to violations that result from malfunctions. The reader is referred to section IV.B. on page 82 of the prepublication version of the

Consequently, the EPA is not taking any action on those particular provisions of Puerto Rico's State SSI plan as discussed herein.

### **III. What are the details of EPA's action?**

On March 21, 2011, in accordance with sections 111(d) and 129 of the CAA, EPA promulgated the SSI EG and compliance times for the control of emissions from existing SSI units. See 76 FR 15371. EPA codified these guidelines at 40 CFR part 60, subpart MMMM. They include a model rule at 40 CFR 60.5085 through 60.5250 that States may use to develop their own plans. Under that rule, EPA has defined an "SSI unit," in part, as any incineration unit that combusts sewage sludge for the purpose of reducing the volume of the sewage sludge by removing combustible matter. 40 CFR 60.5250.

On July 30, 2014<sup>2</sup>, the Puerto Rico Environmental Quality Board submitted its section 111(d) State plan for implementing EPA's EG for existing SSI units located in the Commonwealth of Puerto Rico.

---

federal plan on EPA's website at:  
<https://www3.epa.gov/ttn/atw/129/ssi/SSI%20final%20Federal%20Plan.pdf>.

<sup>2</sup> In emails dated 6/04/2015, 8/10/2015 and 11/10/2015, Puerto Rico responded to EPA's requests to provide clarifying information concerning Puerto Rico's State SSI plan. This clarifying information also is available in EPA's docket at [www.regulations.gov](http://www.regulations.gov).

Puerto Rico amended Rule 102, entitled "Definitions of the Regulation for the Control of Atmospheric Pollution (RCAP)," and incorporated Rule 405(d), entitled "Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units (SSI)," to include the requirements for implementing the SSI EG covered under Sections 111(d) and 129 of the CAA, and codified in 40 CFR part 60, subpart MMMM. Revisions to Puerto Rico's Rules<sup>3</sup> became effective on July 13, 2014.

For further details, the reader is referred to EPA's proposal located in the EPA's electronic docket at [www.regulations.gov](http://www.regulations.gov).

#### **IV. What comments were received on the proposed approval and how has the EPA responded to them?**

There were no comments received on the EPA's proposed rulemaking (80 FR 76894, December 11, 2015) regarding Puerto Rico's State plan for existing SSI units. The 30-day public comment period on the EPA's proposed approval ended on January 11, 2016.

#### **V. What is the EPA's conclusion?**

---

<sup>3</sup> Puerto Rico's SSI regulation can be found at the Puerto Rico Environmental Quality Board's webpage at: <http://www2.pr.gov/agencias/jca/LeyesyReglamentos/Pages/Reglamentos.aspx>. Then look for RCAP Amendment Reg. 8485 for SSI units.

For the reasons described in this rulemaking and in EPA's proposal, the EPA is approving Puerto Rico's sections 111(d) and 129 plan for existing SSI units. However, as described above, the EPA is not taking any action on the affirmative defense provisions in Puerto Rico's Rule 405(d), as follows: (d) (2) (E), (d) (2) (E) (i) and (d) (2) (E) (ii) in Puerto Rico's State plan.

## **VI. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 40 CFR 62.04. Thus, in reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);



- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action does not have tribal implications as specified by Executive Order 13175, because the section 111(d)/129 plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this section.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United

States Court of Appeals for the appropriate circuit by [insert date 60 days after date of publication in the Federal Register].

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

**List of Subjects in 40 CFR Part 62**

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Fertilizers, Fluoride, Incorporation by reference, Intergovernmental relations, Paper and products industry, Phosphate, Reporting and recordkeeping requirements, Sulfur oxides, Sulfuric acid plants, Waste treatment and disposal.

Dated: April 18, 2016.

Judith A. Enck,  
Regional Administrator,  
Region 2.

40 CFR part 62 is amended as follows:

**PART 62 - APPROVAL AND PROMULGATION OF STATE PLANS FOR  
DESIGNATED FACILITIES AND POLLUTANTS**

1. The authority citation for part 62 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart BBB—Puerto Rico**

2. Add §62.13109 and an undesignated heading to subpart BBB to read as follows:

**Air Emissions From Existing Sewage Sludge Incineration Units**

**§62.13109 Identification of plan.**

(a) On July 30, 2014, the Puerto Rico Environmental Quality Board (PREQB) submitted to the Environmental Protection Agency a section 111(d)/129 plan for implementation and enforcement of 40 CFR part 60, subpart MMMM - Emission Guidelines and Compliance Times for Existing Sewage Sludge Incineration Units. In emails dated June 4, 2015, August 10, 2015 and November 10, 2015, the PREQB submitted clarifying information concerning Puerto Rico's plan. The State plan includes revisions to Rule 102 and Rule 405 of the Puerto Rico Regulations for the Control of Atmospheric Pollution, entitled, "Definitions" and "Incineration," Respectively. The revisions to Rules 102 and 405 became effective on July 13, 2014. At the request of Puerto

Rico, EPA has not taken any action on a provision of its State plan allowing for affirmative defenses of Clean Air Act violations in the case of malfunctions.

(b) Identification of sources: The plan applies to existing sewage sludge incineration (SSI) units that:

(1) Commenced construction on or before October 14, 2010; or

(2) Commenced a modification on or before September 21, 2011 primarily to comply with Puerto Rico's plan; and

(3) Meets the definition of a SSI unit defined in Puerto Rico's plan.

(c) The effective date of the plan for existing sewage sludge incineration units is [**insert date 30 days after date of publication in the Federal Register**].